

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of WILLIE MILLIGAN, JR. and U.S. POSTAL SERVICE,  
POST OFFICE, Fayetteville, NC

*Docket No. 03-2037; Submitted on the Record;  
Issued November 7, 2003*

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DECISION and ORDER

Before COLLEEN DUFFY KIKO, DAVID S. GERSON,  
WILLIE T.C. THOMAS

The issue is whether the Office of Workers' Compensation Programs properly denied appellant's request for reconsideration on the grounds that his request was untimely filed and failed to show clear evidence of error.

The Board has duly reviewed the case record in the present appeal and finds that the Office properly determined that appellant's request for reconsideration was untimely and did not demonstrate clear evidence of error.

The only decision before the Board on this appeal is the Office's June 5, 2003 decision denying appellant's request for reconsideration as untimely filed and failing to demonstrate clear evidence of error. Because more than one year has elapsed between the issuance of the Office's May 3, 2001 merit decision rejecting appellant's claim as untimely filed more than three years after the date of the alleged injury, and August 4, 2003, the postmarked date appellant filed his appeal with the Board, the Board lacks jurisdiction to review the May 3, 2001 decision.<sup>1</sup>

To obtain a review of a case on its merits under 5 U.S.C. § 8128(a) a claimant must meet the following requirements:

“(b) The application for reconsideration, including all supporting documents must:

(1) Be submitted in writing;

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<sup>1</sup> See 20 C.F.R. § 501.3(d)(2). Between the May 3, 2001 merit decision and the Office's June 5, 2003 nonmerit decision was a July 19, 2002 nonmerit decision denying appellant's request for reconsideration under 5 U.S.C. § 8128 on the grounds that he failed to submit relevant and pertinent new evidence not previously considered by the Office. As appellant did not request an appeal before the Board until August 4, 2003, which was more than one year after July 19, 2002, that decision is not now before the Board on this appeal. *Id.*

(2) Set forth arguments and contain evidence that either:

- (i) Shows that [the Office] erroneously applied or interpreted a specific point of law;
- (ii) Advances a relevant legal argument not previously considered by [the Office]; or
- (iii) Constitutes relevant and pertinent new evidence not previously considered by [the Office].”<sup>2</sup>

To be entitled to a merit review of an Office decision denying or terminating a benefit, a claimant also must file his or her application for review within one year of the date of that decision.<sup>3</sup> The Board has found that the imposition of the one-year time limitation does not constitute an abuse of the discretionary authority granted the Office under section 8128(a) of the Federal Employees’ Compensation Act.<sup>4</sup> When a claimant fails to meet one of the above-mentioned standards, the Office will deny the application for reconsideration without reopening the case for review on the merits.<sup>5</sup>

The Office, through regulations, has imposed limitations on the exercise of its authority under 5 U.S.C. § 8128(a). As one such limitation, 20 C.F.R. § 10.607(a) provides that the Office will not review a decision unless the application for review is filed within one year of the date of that decision. However, the Office will reopen a claimant’s case for merit review, notwithstanding the one-year filing limitation, if the claimant’s application for review shows clear evidence of error.

To establish clear evidence of error, a claimant has to submit evidence relevant to the issue which was decided by the Office.<sup>6</sup> The evidence has to be positive, precise and explicit and must be manifest on its face that the Office committed an error.<sup>7</sup> Evidence which does not raise a substantial question concerning the correctness of the Office’s decision is insufficient to establish clear evidence of error.<sup>8</sup> It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.<sup>9</sup> This determination of clear error entails a limited review by the Office of the evidence submitted with the reconsideration request to

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<sup>2</sup> 20 C.F.R. § 10.606(b)(1), (2).

<sup>3</sup> 20 C.F.R. § 10.607(a).

<sup>4</sup> *Diane Matchem*, 48 ECAB 532 (1997); *Jeanette Butler*, 47 ECAB 128 (1995); *Mohamed Yunis*, 46 ECAB 827 (1995); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

<sup>5</sup> See 20 C.F.R. § 10.608(b).

<sup>6</sup> See *Dean D. Beets*, 43 ECAB 1153 (1992).

<sup>7</sup> See *Leona N. Travis*, 43 ECAB 227 (1991).

<sup>8</sup> See *Jesus D. Sanchez*, 41 ECAB 964 (1990).

<sup>9</sup> See *Leona N. Travis*, *supra* note 7.

determine whether the new evidence demonstrated clear error on the part of the Office.<sup>10</sup> To show clear evidence of error, the evidence submitted must not only be of sufficient probative value to create a conflict in medical opinion or establish a clear procedural error, but must be of sufficient probative value to *prima facie* shift the weight of the evidence in favor of the claimant and raise a substantial question as to the correctness of the Office decision.<sup>11</sup> The Board makes an independent determination as to whether a claimant has submitted clear evidence of error on the part of the Office such that the Office abused its discretion in denying merit review in the face of such evidence.<sup>12</sup>

In its June 5, 2003 decision, the Office properly determined that appellant failed to file a timely application for review. The Office rendered its most recent merit decision on May 3, 2001 and appellant's request for reconsideration was dated May 23, 2003, which was clearly more than one year after May 3, 2001. Therefore appellant's request for reconsideration of his case on its merits was untimely filed.

In support of his section 8128(a) merit reconsideration request, appellant submitted medical reports dated September 27, 1999 and May 14, 2003 from Dr. Michael M. Haglund, a Board-certified neurosurgeon. The September 27, 1999 report had been previously submitted to the record and was stamped as received prior to issuance of the Office's May 3, 2001 merit decision. Therefore it was repetitious and, further, provided no clear evidence of error in the Office's May 3, 2001 decision. The May 14, 2003 report stated Dr. Haglund's opinion that the work traumas were more likely than not a significant contributing factor in appellant's cervical condition. This opinion was speculative on its face, and also provided no clear evidence of error in the Office's May 3, 2001 decision. Finally, appellant's attorney argued that Dr. Haglund provided a rationalized medical opinion on the etiology and causal relationship of appellant's condition to factors of his federal employment. This argument was not entirely consistent with the substance of the evidence and, further, did not supply clear evidence of error on the part of the Office in its May 3, 2001 decision.

The Office properly conducted a limited review of this evidence and determined that none of the evidence established clear evidence of error on the part of the Office in its May 3, 2001 decision or even raised a substantial question as to its correctness.

The Board, therefore, finds that the Office did not abuse its discretion in denying appellant's request to reopen his case for a further review on its merits.

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<sup>10</sup> See *Nelson T. Thompson*, 43 ECAB 919 (1992).

<sup>11</sup> *Leon D. Faidley, Jr.*, *supra* note 4.

<sup>12</sup> *Gregory Griffin*, 41 ECAB 186 (1989), *reaff'd on recon.*, 41 ECAB 458 (1990).

Accordingly, the decision of the Office of Workers' Compensation Programs dated June 5, 2003 is hereby affirmed.

Dated, Washington, DC  
November 7, 2003

Colleen Duffy Kiko  
Member

David S. Gerson  
Alternate Member

Willie T.C. Thomas  
Alternate Member